award judgment as a matter of law.[2] The district judge, relying on *Ackel*, held that Wilson's criticism of the appointment of Roberts did not constitute protected activity under section 704(a) because the preferential actions to which he objected were permitted by Title VII.

> [T]he court is of the opinion that the plaintiff did not engage in protected action in his conference with Dr. Potter. . . . Preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world except the one paramour. *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (citing *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002)).

(App. 9a-10a).

On appeal, Wilson argued that his objections to the Roberts appointment was protected activity so long as he reasonably believed that Delta State's actions constituted unlawful discrimination on the basis of gender.[3] Wilson relied on longstanding Fifth Circuit case law holding (as have eleven other circuits) that a plaintiff can invoke the anti-retaliation protections of section 704(a) without establishing that the employer had actually engaged in unlawful discrimination, so long as the plaintiff at the

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[2] The order states that "[t]he court . . . is ready to rule on the motion of the defendants for judgment as a matter of law." (App. 8a). This is somewhat misleading; the district court had actually ruled on that motion on August 4, 2004, and was simply explaining the basis of its earlier decision.

[3] Brief of Appellant, *Wilson v. Delta State University*, No. 04-60759 (5th Cir.), pp. 16-18.

time of his or her opposition had a "reasonable belief" that the employer was violating Title VII. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-28 (5th Cir. 2000); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A 1981).

The Fifth Circuit rejected this interpretation of section 704(a). It held that section 704(a) protects only an employee whose reasonable (but mistaken) belief that his or her employer was violating Title VII was based on an error of fact, and does not protect employees who had made an error of law.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while *in fact*, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store opportunities. [654 F.2d] at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice *is not actually unlawful, which is the situation here*.

(App. 5a-6a) (Emphasis added). When he met with Dr. Potter in April 2000 Dr. Wilson believed that favoritism for a paramour was gender-based discrimination. But, the Fifth Circuit held, Wilson's 2000 opposition to that practice was unprotected in light of the August 2003 decision in *Ackel* that authoritatively determined that such preferential treatment did not constitute gender-based discrimination within the scope of Title VII.

> The practice of which Wilson complained, that Roberts was unqualified and was hired because

> of an affair, is not a practice made unlawful by Title VII. . . . *Ackel v. Nat'l Communications, Inc.* . . . Because it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII, *id.*, Wilson's alleged belief to the contrary could not have been reasonable.

(App. 6a-7a). Under the decision of the Fifth Circuit, it was of no consequence that the legality of paramour favoritism only became "settled law in this Circuit" when the issue was decided in 2003 in *Ackel*, more than two years *after* Wilson had engaged in the assertedly protected activities.

REASONS FOR GRANTING THE WRIT

THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE SCOPE OF THE ANTI-RETALIATION PROVISION OF SECTION 704(a) OF TITLE VII

Section 704(a) of Title VII prohibits employers from retaliating against an employee because he or she "opposed any practice made an unlawful employment practice by this title." 20 U.S.C. § 2000e-3(a). Essentially identical anti-retaliation provisions are contained in the Americans With Disabilities Act,[4] the Age Discrimination in Employment Act,[5] and the Family and Medical Leave Act.[6]

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[4] 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual opposed any act or practice made unlawful by this Act. . . .")

[5] 29 U.S.C. § 623(d) ("It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section. . . .")

[6] 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.")

These prohibitions are critical to ensuring that employees can without fear of retaliation object to their employers about discrimination. As is the case with regard to Title IX, compliance with Title VII

> "would be difficult, if not impossible to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Brief for the United States as *Amicus Curiae* 13. If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of violations might go unremedied.

Jackson v. Birmingham Board of Education, ___ U.S. ___, 125 S.Ct. 1497, 1508 (2005); *see id.* at 1513 (Thomas, J., dissenting) ("protection from retaliation . . . serves as a prophylactic measure to guard the primary right.") Title VII seeks to encourage employees to resolve discrimination complaints with their employers informally, without resort to litigation or even EEOC intervention. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "EEOC's policy of encouraging the development of grievance procedures.")

Twelve circuits hold that section 704(a) does not require employees to prove *both* that they were retaliated against *and* that the employer had actually engaged in a separate act of unlawful discrimination.[7] In every

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[7] *Wyatt v. City of Boston*, 35 F.3d 13, 18 (1st Cir. 1994); *Manoharan v. Columbia Coll. of Physicians & Surgeons*, 842 F.2d 590, 592 (2d Cir. 1998); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir. 1986); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*,

(Continued on following page)

geographical circuit, a section 704(a) claimant need only show that he or she could reasonably have believed that the actions which he or she opposed were unlawful under Title VII.[8] The expression of opposition to discrimination is protected activity under Title VII so long as the employee could reasonably have believed that unlawful discrimination had occurred.

This interpretation of section 704(a) is vital to the implementation of Title VII. First, employees rarely know for certain whether their employers are violating the law; few employees would be brave enough to object to what appeared to be discrimination if they knew they could legally be fired for that complaint if it turned out that their employer had not actually violated Title VII.[9]

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224 F.3d 701, 704 (7th Cir. 2000); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 358 (8th Cir. 1997); *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978); *Zinn v. McKune*, 143 F.3d 1353, 1362 (10th Cir. 1998); *Bigge v. Albertson's, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981).

[8] In *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001), this Court noted but did not address the correctness of this interpretation of Title VII.

[9] The employer in *Clark County School District v. Breeden*, 532 U.S. 268 (2001), correctly explained that the courts of appeals have construed section 704(a) in this manner out of concern that limiting the application of that anti-retaliation provision to employees who could prove the correctness of their original claim of discrimination "would chill use of informal means to resolve claims by employees lacking the sophistication to interpret Title VII or predict the law." Petition for Writ of Certiorari, *Clark County School District v. Breeden*, No. 00-866, p. 18.

Second, in many retaliation cases which reach the federal courts, the original claim of discrimination is no longer being pursued; the employee may have decided to drop the discrimination claim because it is less important than the retaliation (e.g., because the employee was dismissed for complaining about a discriminatory but minor salary difference), or that discrimination claim itself might be time barred. If section 704(a) prohibited only opposition to *actual* discrimination, every section 704(a) lawsuit would also have to determine the merits of the separate discrimination controversy that triggered the retaliation. Even when a plaintiff does assert both a discrimination and a retaliation claim, it frequently occurs that the plaintiff is able to present substantial evidence only regarding the retaliation claim.[10]

Third, with regard to harassment claims, a Title VII plaintiff may be barred from obtaining relief for the discrimination itself if he or she "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765. But if section 704(a) permits an employee to fire workers who object to harassment that a court later determines was not serious enough

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[10] *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998):

> It sometimes happens – more frequently than might be imagined – that an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim.

Even where a plaintiff succeeds in getting to trial on both claims, it is not uncommon for the plaintiff to prevail only on the retaliation claim.

to violate Title VII, harassment victims will justifiably be afraid to complain about harassment in the manner required by *Ellerth*.

> Without protection from retaliation, individuals who witness discrimination would likely not report it, [harassment] claims would be short-circuited, and the underlying discrimination would go unremedied.

Jackson v. Birmingham Board of Education, 125 S.Ct. at 1508.

There are two distinct types of situations in which a plaintiff asserting a section 704(a) retaliation claim might reasonably but incorrectly believe that the actions he or she opposes are forbidden by Title VII.

> The practice opposed may not constitute a violation of Title VII through two types of mistakes: a mistake of fact or a mistake of law. As an example of a mistake of fact, the person opposing the practice may claim racial discrimination in the discharge of a black co-worker. If in fact the co-worker was discharged for a legitimate reason, and race played no part, the person in question would have made a mistake of fact. . . . An example of a mistake of law would be where the plaintiff fully understood the facts, but the facts simply did not constitute a violation of Title VII.

B. Schlei and P. Grossman, Employment Discrimination Law, p. 543 n.38 (2d ed. 1983). The courts of appeals are in agreement that a retaliation victim can bring a section 704(a) action despite a good faith reasonable error of fact. The Question Presented is whether an error of law on the part of such a retaliation victim, unlike an error of fact, places the employee outside the protections of section 704(a).

I. THE COURTS OF APPEALS DIFFER AS TO WHETHER SECTION 704(a) PROTECTS AN EMPLOYEE WHO MISAPPREHENDS WHETHER TITLE VII FORBIDS THE PREFERENTIAL ACTIONS WHICH HE OR SHE OPPOSES

This case presents a multi-faceted conflict regarding whether the anti-retaliation protections of section 704(a) are unavailable to employees who misapprehend whether a preferential employment practice to which they object is or is not a violation of Title VII.

This conflict has its roots in a sharp disagreement about whether employees are required, at their peril, to know the correct interpretation of Title VII's prohibition against discrimination. The Eleventh Circuit holds that an employee's belief that an employer has violated Title VII is inherently unreasonable whenever, under the court's construction of Title VII, that belief is incorrect, regardless of whether or why the employee was unaware of that interpretation.

> The plaintiffs . . . argue that when judging the reasonableness of their belief, we should not charge them with substantive knowledge of the law. . . . We reject the plaintiffs' argument because it would eviscerate the objective component of our reasonableness inquiry.

Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 n.2 (11th Cir. 1998). On the other hand, the Ninth Circuit holds that in determining whether a retaliation victim could reasonably believe his or her employer had violated Title VII, the courts must "mak[e] due allowance . . . for the limited knowledge possessed by most Title VII plaintiffs about the . . . legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994); *see Darmanin v.*

San Francisco Fire Dept., 46 Fed. Appx. 394, 395 (9th Cir. 2002) (same); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996) (same).

This underlying disagreement has spawned a well-established inter-circuit conflict. Three circuits, including the Fifth, hold that section 704(a) does not protect a retaliation victim who did not know the relevant judicial interpretation of Title VII, even where – as here – the precedent relied on was only issued *after* the employee had engaged in the activity triggering that retaliation. Four circuits hold, to the contrary, that the protections of section 704(a) are available despite an error of law, at least where the controlling judicial interpretation of Title VII was established subsequent to the assertedly protected activity. Two circuits, including the Ninth, hold that – regardless of how clear the caselaw may have been at the time of the assertedly protected activity – that activity will still be protected if it would not have been clear to a layman that the actions in question would not constitute unlawful discrimination. The Eleventh Circuit rejects making such allowance for the limited legal knowledge of non-attorneys.

(a) In the instant case, Delta State argued that an error of law was fatal per se to a section 704(a) claim; opposition to employer actions that did not violate Title VII, it asserted, simply is not protected activity.[11] The Fifth Circuit agreed.

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[11] Brief for Appellees, No. 04-60759 (5th Cir.), p. 17:

> Even if Plaintiff's allegations were correct, the appointment of Dr. Roberts because of her relationship is not, as a matter of law, an '"unlawful employment practice" under Title VII.

(Continued on following page)

The court of appeals had earlier held that section 704(a) protects an employee who had a "reasonable belief" that the opposed practice was unlawful. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A 1981). The court below insisted that the "reasonable belief" rule applies only to errors of fact, not to errors of law.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while *in fact*, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store opportunities. [654 F.2d] at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice *is not actually unlawful, which is the situation here*.... Whether Wilson believed to the contrary is immaterial.

(App. 5a-6a) (Emphasis added). "Wilson's alleged belief to the contrary could not have been reasonable," the Fifth Circuit held, because under *Ackel v. National Communications*, 339 F.3d 375 (5th Cir. 2003) "it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII." (App. 6a-7a). *Ackel*, of course, was decided two years *after* the opposition activity in question in this case. Under the decision below, however, an error of law is

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See, Ackel, 339 F.2d at 382.... Therefore, Plaintiff's speaking out in opposition to Dr. Roberts' appointment six months after the fact is not protected activity under Title VII.

unreasonable per se so long as the legal issue in question is decided by the court of appeals in favor of the employer prior to the end of the section 704(a) litigation.

In *Robben v. Runyon*, 2000 WL 123421 (10th Cir. 2000), the Tenth Circuit took a similar approach. The district court in that case had rejected the plaintiff's section 704(a) claim on the ground that "a plaintiff may not maintain a retaliation claim under Title VII where the alleged conduct that is the subject of the complaint, even if true, is not actionable under Title VII." *Robben v. Runyon*, 1998 WL 92237 at *7 (D.Kan. 1998). The Tenth Circuit expressly adopted the reasoning of the district court. *Robben v. Runyon*, 2000 WL 123421 at *4. The Department of Justice correctly reads the Tenth Circuit decision in *Runyon* to hold that opposition activity is never protected by section 704(a) unless the disputed practices are in fact unlawful under Title VII.[12] Judge Murphy dissented in *Robben*, arguing that this narrow

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[12] Defendant's Motion for Summary Judgment and Brief in Support Thereof, *Mattioda v. Caldera*, No. 00-CV-772-E(J) 2001 WL 34782190 (N.D. Okl. 2001) at 14-16:

> [W]e do not here have a case of opposition activity under Title VII – the underlying activity of which Plaintiff complained, if proven, is not made unlawful by Title VII. . . . [N]ot only must one have had a reasonable good faith belief that the defendant was engaging in discrimination, one must also show that the activity complained of (whether proven or not) is made unlawful by Title VII. . . . It is apparent that the good faith belief requirement comes into play only after a determination that the practice opposed, whether proven or not, is made unlawful by Title VII.

See Mattioda v. White, 323 F.3d 1288, 1293 (10th Cir. 2003).

interpretation of section 704(a) would deter informal efforts to enforce Title VII:

> With no exceptions for a plaintiff-employee's good faith, the rule employed by the majority ties the validity of the retaliation claim to the *legal* validity of the underlying Title VII claim. . . . The efficacy of Title VII as a bulwark against discrimination is thus diminished. . . . "Determining whether there is an actual violation can mislead even an experienced district court, and a sensible employee who knew he had a right to enjoy whistleblower protection would think twice about reporting conduct which might turn out to be lawful." *Sapperstein v. Hager*, 188 F.3d 853, 857 (2d Cir. 1999).

2000 WL 123421 at *5 (Emphasis added).

The Fourth Circuit decision in *Mayo v. Kiwest Corp.*, 1996 WL 460769 (4th Cir. 1996), is a particularly striking application of this constricted reading of section 704(a). The plaintiff in that case asserted that he had been fired for objecting to same-sex sexual harassment. Plaintiff contended that it was reasonable to believe that same-sex sexual harassment was unlawful, even if the harasser was not a homosexual, because EEOC had construed Title VII in precisely that manner in its Compliance Manual and in an earlier administrative determination. 1996 WL 460769 at *5. The Fourth Circuit held that the plaintiff could not reasonably have believed the harassment violated Title VII, and that the plaintiff thus was not protected by section 704(a) because (in the view of the court of appeals) the EEOC had itself misinterpreted the prohibitions of Title VII.

> To the extent these two EEOC pronouncements can be read to interpret Title VII as providing a cause of action for the victim of the kind of heterosexual male-on-heterosexual-male conduct alleged by Mayo, we conclude such an interpretation is *irrational*. . . . Owning no deference to the EEOC's irrational interpretation of Title VI[I] . . . , we reject Mayo's reliance on such an interpretation as unreasonable.

Id. (Emphasis added). The retaliatory dismissal of Mayo was therefor permitted by section 704(a). Two years after the Fourth Circuit held that the EEOC interpretation was irrational, and that Mayo's belief he was opposing a Title VII violation was thus incorrect and thus could not have been reasonable, this Court unanimously held the very conduct which Mayo had opposed was indeed unlawful under Title VII. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

(b) Four circuits hold that an employee's belief that he is opposing an unlawful practice cannot be rendered unprotected by section 704(a) after the fact by a *subsequent* judicial determination regarding the legality of the practice at issue.

In *Berg v. La Crosse Cooler Company*, 612 F.2d 1041 (7th Cir. 1980), the plaintiff had been fired in April 1976 because she had objected to the fact that her employer's disability leave program did not cover pregnancy-based disability. Nine months after Berg's dismissal, this Court held that the employer's actions in refusing to cover pregnancy-related disability was permissible under Title VII. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The district court then dismissed Berg's retaliation claim, reasoning that

> [e]ven though the Supreme Court interpreted the statute after the discharge, that Court's interpretation meant, as the district court phrased it, that defendant's program was not unlawful "at the time."

612 F.2d at 1045. The Seventh Circuit rejected the district court's view that section 704(a) protects only opposition to practices which the courts later determine to be unlawful, holding that such a reading.

> . . . undermines Title VII's central purpose, the elimination of employment discrimination by informal means; destroys one of the chief means of achieving that purpose, the frank and nondisruptive exchange of ideas between employers and employees; and serves no redeeming statutory or policy purposes of its own. Section [704(a)] plays a central role in effectuating these objectives. By protecting employees from retaliation, it is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed. . . .
>
> The plaintiff . . . should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.

612 F.2d at 1045.

A similar problem concerning an intervening decision of this Court arose in *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981). The plaintiff in that case had in the years 1976-78 repeatedly complained to his employer that its affirmative action plan was discriminatory. Six months after the plaintiff brought suit under

Title VII, this Court decided *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), which largely resolved in favor of the employer Parker's challenge to that affirmative action plan. Parker then moved to amend his complaint to assert a retaliation claim under section 704(a); the district refused to permit such an amendment on the ground that Parker's opposition to B&O's affirmative action plan would not be protected by Title VII if that plan itself was lawful. The District of Columbia Circuit reversed.

> We reject this interpretation of the opposition clause, because making the protected nature of an employee's opposition to alleged discrimination depend on the ultimate resolution of his claim would be inconsistent with the remedial purposes of Title VII. . . .
>
> [B]y extending protection to employees who oppose discriminatory practices without recourse to EEOC, Congress encouraged voluntary internal attempts to remedy discrimination. The remedial purposes of Title VII would be ill served by telling employees . . . that internal opposition, though encouraged, is undertaken "at the accuser's peril." . . .
>
> B&O argues that most of the cases rejecting a narrow reading of the opposition clause are inapposite here, because they involve mistakes "of fact" rather than mistakes "of law." . . . [W]e find the suggested distinction irrelevant to the purposes of section 704(a). Characterization of the employee's mistake as one of fact or of law affects neither the employee's interest in action on his beliefs nor the employer's interest in asserting legitimate management prerogatives. . . . [A] layperson should not be burdened with the

> "sometimes impossible task" of correctly anticipating how a given court will interpret a particular statute.

652 F.2d at 1020.

The Third Circuit has also held that retaliation victims are protected under circumstances similar to those in the instant case. In *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990), the plaintiff had objected in 1984-85 to problems that arose out of a romantic relationship between the plaintiff's supervisor and one of the plaintiff's subordinates; that complaint led to a series of retaliatory actions against Drinkwater. Drinkwater filed suit in state court under the New Jersey anti-discrimination statute; she alleged both employment discrimination (arising out of the romantic relationship) and unlawful retaliation. The defendant removed the case to federal court. In 1990, while the case was pending in the district court, the New Jersey Supreme Court interpreted the New Jersey law in a manner that foreclosed Brinkwater's discrimination claim as a matter of law. The federal courts determined that the New Jersey courts would apply Title VII standards in resolving Brinkwater's remaining retaliation claim. 904 F.2d at 865. The Third Circuit held that under Title VII standards the retaliation claim was still viable, even though the practices which the plaintiff had opposed in 1984-85 had been held, in 1990, to be lawful.

> In determining the reasonableness of plaintiff's belief that she was being discriminated against, it is necessary to look first to the pre-existing case law. *See, e.g., Berg v. LaCross Cooler Co.*. . . . [T]he fact that, when plaintiff began her lawsuit. there was conflicting authority (in different [federal] circuits) on whether a female plaintiff could

> survive summary judgment by alleging that she was denied a job because of a consensual sexual relationship between a supervisor and a co-worker, certainly would support a finding that plaintiff was reasonable in believing that she had a claim. Plaintiff is not required to guess the outcome of New Jersey law correctly, *ex ante*.

904 F.2d at 865-66.

In the instant case the Fifth Circuit attempted to distinguish decisions like *Berg* by asserting that "the pregnancy issue *was* an unsettled question of law before the *General Electric* decision" (App. 7a n.2) (emphasis added), whereas the legality of paramour favoritism "*is* settled law in this Circuit." (App. 6a-7a) (emphasis added). The difference in the tense in these two passages illustrates precisely the conflict between the decision below and the decisions in the Third, Seventh, Eighth, and District of Columbia Circuits. Those circuits hold, at the least, that opposition activity is protected by section 704(a) if the law regarding the legality of the practices being opposed was not authoritatively settled *before* the plaintiff opposed the practices in question; in the decision below, Wilson's conduct was deemed unprotected because the legality of the practice that he opposed had became settled law in the Fifth Circuit *after* Wilson's actions. That is precisely the circumstance which four circuits hold cannot affect the viability of a retaliation claim.

(c) Decisions in the Ninth and Second Circuits conflict with the decision below on a separate issue.

The Ninth Circuit holds that, regardless of how clear the case law might have been at the time of the assertedly protected activity, courts must "mak[e] due allowance . . .

for the limited knowledge possessed by most Title VII plaintiffs about the . . . legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1995). The Ninth Circuit applied this construction of section 704(a) in *Trent v. Valley Electric Assoc.*, 41 F.3d 524 (9th Cir. 1994). Trent had been fired when she complained about sexual harassment by an outside consultant who had been hired by her employer. The district court dismissed Trent's retaliation claim on the ground that Title VII did not apply to or forbid sexual harassment by an outside consultant. 41 F.3d at 526. In reinstating that retaliation claim, the Ninth Circuit thought it unnecessary to decide whether harassment by an outside consultant is or is not actually forbidden by Title VII; the retaliation claim was viable so long as Trent could have reasonably believed that such harassment was unlawful.

> [A] plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII. To establish the first element of a prima facie case, Trent must only show that she had a "reasonable belief" that the employment practice she protested was prohibited under Title VII. . . . To find that Title VII's opposition clause only protects those who can prove that the conduct at issue *is actually unlawful* "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances." *Sias [v. City Demonstration Agency]*, 588 F.2d [692,] 695 [(9th Cir. 1978).

41 F.3d at 526.

In *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998), the plaintiff alleged both that she had been

sexually harassed and that she had been dismissed for complaining about that harassment. The Second Circuit concluded that the incidents of harassment, while "obviously offensive," were too isolated and discrete to constitute unlawful sexual harassment. 159 F.3d at 768. But although the incidents were insufficient as a matter of law to violate Title VII, the court of appeals held that the incidents were sufficiently serious that the plaintiff could reasonably have believed that they were illegal.

> [I]t is possible for an employee to reasonably believe that specified conduct amounts to harassment, even when that conduct would not actually qualify as harassment under the law. . . . Though we held above that Quinn has failed to adduce facts sufficient to establish Green Tree's liability for sexual harassment, we are satisfied that her complaints of sexual harassment . . . included sufficient evidence to sustain a good faith, reasonable belief that Green Tree stood in violation of the law.

159 F.3d at 769. The section 704(a) claim was viable because a layman could not have been expected to be familiar with the Second Circuit sexual harassment precedents under which the harassment claim was ultimately dismissed.

The standard announced by the Fifth Circuit in the instant case makes no such allowance for the obvious limitations on the understanding of ordinary workers of the complexities of Title VII caselaw. And the Eleventh Circuit expressly precludes consideration of such limitations on the actual legal knowledge of employees. *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE TO THE ENFORCEMENT OF TITLE VII

The decision below poses a serious threat to the utilization of the informal complaint and grievance mechanisms which Congress intended to encourage and protect. Employees are unlikely to complain to their employers if they realize that any legal insufficiency in their claim of discrimination would mean that that complaint could lead to an entirely lawful retaliatory dismissal. The West Virginia Supreme Court, in applying to state anti-retaliation law the reasonable belief doctrine utilized by federal courts in section 704(a) cases, explained that the purposes of an anti-retaliation law

> would be wholly defeated if its protection applied only to those individuals who confidently know the technical area of fair employment law and who correctly predict how its doctrine will ultimately be applied in a court of law.

Hanlon v. Chambers, 195 W. Va. 99, 113, 464 S.E. 741, 755 (1995).

A narrow construction of the opposition clause in section 704(a) will force aggrieved employees to resort directly to the EEOC, forsaking utilization of less formal compliant or grievance procedures established by their own employers. Section 704(a) contains an absolute protection for employees who file charges with the EEOC or otherwise participate in an EEOC proceeding, regardless of the merit of those charges. "The remedial purposes of Title VII would be ill served by telling employees that they can be sure of protection only if they limit their complaints about discrimination to formal EEOC filings."

Parker v. Baltimore and Ohio R.R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981).

Limiting section 704(a) to errors of fact would seriously interfere with important exchanges of views between employees and employers about employment practices such as affirmative action. A significant number of workers hold the view, shared by some members of this Court, that affirmative action (or certain forms thereof) constitute illegal discrimination under Title VII. In many instances, of course, the affirmative action to which workers may today object is clearly lawful under the majority opinions in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987). Since the legality of many types of affirmative action is now "settled law," employees in the Fifth Circuit, and elsewhere, could be dismissed for expressing to their employers the same objections to affirmative action that were articulated by several members of this very Court in *Weber* and *Johnson*.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DETERMINING THE QUESTION PRESENTED

This case presents an appropriate vehicle for resolving the inter-circuit conflict regarding whether the protections of section 704(a) are lost, retroactively, if a court determines *after* the opposition activity has occurred that the practices to which the retaliation victim objected were lawful under Title VII. That is precisely what occurred in the instant case, in which the Fifth Circuit relied on a 2003 decision in *Ackel* (and arguably the 2002 decision in *Green*) to hold that Wilson could not reasonably have

believed at the time of his 2001 objection to paramour favoritism that such preferential action violated Title VII.

This case also provides an appropriate occasion to determine whether, as the Ninth Circuit holds, the reasonableness of an employee's belief that he or she is opposing unlawful discrimination should be evaluated in light of the limited knowledge of laymen, who will rarely, if ever, be familiar with judicial decisions interpreting Title VII. Regardless of what understanding of Title VII might be gleaned from a careful review (in 2001 or today) of reported and unreported appellate decisions regarding favoritism for a paramour, a layman (or indeed, a judge) familiar only with the fact that Title VII forbids discrimination "because of . . . sex" might reasonably conclude that such preferential treatment is unlawful. When this issue first arose, that was precisely the manner in which Title VII was construed by a number of judges,[13] including the Chief Judge of the Southern District of New York[14] and Judge Gessell of the District Court for the District of Columbia.[15] For a time the lower courts were evenly divided regarding whether Title VII forbad favoritism for a paramour. Then Judge Scalia (among others) insisted in *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1985) (opinion regarding denial of rehearing en banc) that that was on open question of statutory interpretation. Legal scholars

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[13] In addition to the cases cited below, *see Kersul v. Skulls Angels, Inc.*, 130 Misc. 2d 345, 495 N.Y.S. 2d 886 (S.Ct. 1985).

[14] Chief Judge Brieant held, after a bench trial, that such favoritism violated Title VII. *DeCinto v. Westchester County Medical Center*, 807 F.2d 304, 304-07 (2d Cir. 1986).

[15] *King v. Palmer*, 598 F. Supp. 65 (D.D.C. 1984), *vacated on other grounds, King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985).

have been sharply divided about whether such favoritism violates Title VII.[16] If, as the Ninth Circuit holds, employees cannot be expected to have more than a common sense understanding of what constitutes gender-based discrimination, the fact that judges and scholars could disagree about the meaning of Title VII is entirely sufficient to demonstrate that an ordinary worker could reasonably believe that favoritism for a paramour constitutes unlawful discrimination, and to compel the conclusion that opposition to such preferences is protected by section 704(a).

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[16] Joan Von Toll, Eros Gone Awry: Liability Under Title VII for Workplace Sexual Favoritism, 13 Indust. Rel.L.J. 153, 167 (1991) (noting division among earlier judicial decisions); Robert Shearer, Paramour Claims Under Title VII: Liability for Co-Worker/Employer Sexual Relations, 15 Employee Rel.L.J. 57 (1989); Mary Manemann, The Meaning of "Sex" in Title VII: Is Favoring An Employee A Violation of the Act, 83 N.W.U.L.Rev. 612, 612 (1989) ("That simple prohibition has been interpreted to yield very different outcomes in a factual scenario involving a sex discrimination claim new to Title VII jurisprudence: the hired or promoted lover"); Michael J. Phillips, The Dubious Title VII Cause of Action for Sexual Favoritism, 51 Wash. & Lee L. Rev. 547, 549 (1994) ("A majority of the courts that have considered sexual favoritism claims have recognized the possibility of recovery for sexual favoritism under one theory or another."); Note, Sex, Promotions and Title VII: Why Sexual Favoritism Is Not Sexual Discrimination, 45 Hastings L.J. 667, 668-69 (1994) (noting that the law on this issue "is still very much uncertain").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DENNIS L. HORN*
SHIRLEY PAYNE
HORN & PAYNE, PLLC
P. O. Box 2754
Madison, MS 39130-2754
(601) 853-6090

ERIC SCHNAPPER
School of Law
University of Washington
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

WILLIAM HARRY WILSON,
Plaintiff-Appellant,
versus
DELTA STATE UNIVERSITY et al.,
Defendants-Appellees.
No. 04-60759 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

143 Fed. Appx. 611; 2005 U.S. App. LEXIS 16964

August 12, 2005, Filed

JUDGES: Before GARZA, BENAVIDES, and CLEMENT, Circuit Judges.

OPINION:

PER CURIAM:[1]

William Harry Wilson appeals the district court's ruling granting a motion for judgment as a matter of law ("JMOL") in favor of Delta State University and the individual defendants (collectively, "Delta State") in this employment discrimination action. Finding no error, we affirm.

I. FACTS AND PROCEEDINGS

Wilson was employed by Delta State University as director of its Audio-Visual Center from 1983 to 2001. On October 26, 2000, Dr. David Potter, the president of the University, appointed Dr. Michelle Roberts as Chief

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Information and Planning Officer ("CIPO"). Potter did not advertise the CIPO position before appointing Roberts, but Delta State claims that such advertising was not necessary under the University's policy because the appointment was an internal promotion. Roberts became Wilson's supervisor and the relationship between Roberts and Wilson quickly deteriorated. From mid-March to mid-April of 2001, Roberts prepared a plan to consolidate the Audio-Visual Center and Instructional Technology Center into a new Technology Learning Center. This plan would eliminate Wilson's position, but Roberts allegedly had no intention of hiring Wilson to be the director of the new center because of their problematic relationship.

On April 20, Wilson met with Potter to discuss his frustration regarding the changes in the audio-visual and technology departments. He told Potter that Roberts was not qualified for the CIPO position and that she only got the job because she was having an affair with Dr. Leroy Morganti, a University administrator.

On April 24, Roberts proposed her plan to the University. The University approved the plan, and Wilson's position was eliminated. On June 29, Potter informed Wilson that his position was being eliminated and that his contract would not be renewed.

On November 21, 2002, Wilson brought this action in the United States District Court for the Northern District of Mississippi, alleging that Delta State declined to renew his contract in retaliation for his complaints to Potter that Roberts was not qualified for the CIPO position and that she received the appointment because she was having an affair with Morganti. Wilson also brought a gender discrimination claim and a state breach of contract claim.

On July 23, 2004, the district court granted Delta State's motion for summary judgment on Wilson's gender discrimination claim and denied its motion for summary judgment on Wilson's retaliation and state breach of contract claims. Delta State made a motion to reconsider, and the district court determined that it did not have jurisdiction over the state law claims and accordingly dismissed those claims.

On August 2, a trial commenced on the retaliation claim. At the close of Wilson's case, Delta State moved for JMOL. The district court granted this motion and subsequently entered an order confirming its ruling, holding that Wilson had not made out a *prima facie* case of retaliation because he "did not engage in protected action in his conference with Dr. Potter," i.e., Wilson did not complain about an employment action which violated Title VII. The district court reasoned that Delta State's alleged preferential treatment of Roberts because she was having an affair with Morganti was not gender discrimination because "preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world except the one paramour." Regarding Wilson's complaint that Delta State improperly failed to advertise the position, the court pointed to cases holding that the failure to advertise a position does not amount to gender discrimination.

Wilson timely appealed the district court's judgment and order granting the motion for JMOL on the retaliation claim.

II. STANDARD OF REVIEW

This Court reviews the district court's grant of JMOL *de novo*. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 218-19 (5th Cir. 2001). JMOL shall be granted when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.* (quoting Fed. R. Civ. P. 50(a)). The record must reveal "more than a mere scintilla of evidence" for this Court to reverse the grant of JMOL. *Id.* at 219.

III. DISCUSSION

Where a plaintiff presents only circumstantial evidence of retaliation, as is the case here, the *McDonnell Douglas* framework guides our analysis. *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001). Under *McDonnell Douglas*, Wilson must first establish a *prima facie* case of retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). To do so, he must demonstrate: (1) that he engaged in an activity protected by Title VII; (2) that he experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001).

An employee has engaged in protected Title VII activity if "he or she has (1) 'opposed any practice made an unlawful employment practice by this subchapter,' or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Byers v. Dallas Morning News, Inc.*, 209

F.3d 419, 427-28 (5th Cir. 2000) (emphasis omitted) (quoting 42 U.S.C. § 2000e-3(a)). The relevant clause is the opposition clause, because Wilson never participated in any formal Title VII proceedings, but merely complained to Potter. The opposition clause requires that the employee demonstrate that he or she had at least a "reasonable belief" that the opposed practice was unlawful. *Id.* at 428 (citing *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A Sept. 1981)).

Wilson argues that he reasonably believed that Roberts got her job because of the affair, and that this favoritism amounted to discrimination in violation of Title VII. He relies on *Payne*, in which this Court addressed the issue "whether proof of an actual unlawful employment practice is necessary under the opposition clause, or whether an employee is protected from retaliation under the opposition clause if the employee reasonably believes that the employer is engaged in unlawful employment practices." *Payne*, 654 F.2d at 1138. This Court decided the latter, holding that "a plaintiff can establish a *prima facie* case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices." *Id.* at 1140. Wilson's reliance on this holding, however, is misplaced.

Payne involved an employee who believed the employer was engaged in an actual unlawful practice, even while in fact, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store employment opportunities. *Id.* at 1137.

Payne does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice is not actually unlawful, which is the situation here.[2] The practice of which Wilson complained, that Roberts was unqualified and was hired because of an affair, is not a practice made unlawful by Title VII. "'When an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.'" *Ackel v. Nat'l Communications., Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (quoting *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002)). Whether Wilson believed to the contrary is immaterial. Even if his allegation that Roberts obtained the position because of her affair were [sic] correct, such "paramour favoritism" is not an unlawful employment practice under Title VII, because "the fact that [Wilson] may have been terminated for complaining about favorable treatment received by [Roberts] is unrelated to [Wilson's] gender." *Id.* Because it is settled law in this

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[2] *Payne* does discuss and rely upon such a case, but that case is distinguishable. 654 F.2d at 1138 (discussing *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980)). In *Berg*, the plaintiff was discharged after opposing as gender-based discrimination her employer's failure to provide pregnancy benefits. After she was fired, the United States Supreme Court held that a disability plan does not violated [sic] Title VII because of its failure to cover pregnancy-related disabilities. *General Electric Co. v. Gilbert*, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976). The Seventh Circuit held that because the employee opposed a practice that she reasonably believed was unlawful under Title VII, her opposition was protected from retaliatory discharge, even though the practice was later determined not to be an unlawful practice. *Berg* is distinguishable from the present case, however, because the pregnancy issue was an unsettled question of law before the *General Electric* decision, and the plaintiff's belief that the practice violated Title VII was therefore reasonable.

Circuit that such paramour favoritism does not run afoul of Title VII, *id.*, Wilson's alleged belief to the contrary could not have been reasonable.

Because we agree with the district court and hold that Wilson has not satisfied the first prong of a *prima facie* case of retaliation, that he engaged in a activity protected by Title VII, we need go no further in our analysis.[3]

IV. CONCLUSION

Wilson failed to establish a *prima facie* case of retaliation; the decision of the district court granting Delta State's motion for JMOL is therefore AFFIRMED.

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[3] Wilson argues that the district court erred in its holding that failure to advertise a position does not amount to gender discrimination by relying on cases that have been overturned by *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (holding that "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). We need not reach Wilson's argument because *Reeves* applies to whether a defendant's proffered explanation for an employment action is pretextual. *Id.* at 142-43 (explaining that after a plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate a non-discriminatory reason, and the plaintiff then bears the burden of persuasion to show that the proffered explanation is pretextual). Because Wilson has failed to establish a *prima facie* case, we need not address whether Delta State's explanation for appointing Roberts without advertising was a pretext for discrimination.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM HARRY WILSON PLAINTIFF

V. CIVIL ACTION NO. 2:02CV269-B-D

DELTA STATE UNIVERSITY, ET AL. DEFENDANTS

ORDER GRANTING JUDGMENT AS A MATTER OF LAW

(Filed Aug. 24, 2004)

The court has read the testimony of the plaintiff, has reread the cases that were cited by counsel for both sides, and is ready to rule on the motion of the defendants for judgment as a matter of law.

To make out a prima facie case of retaliation, the plaintiff must have complained to the defendant about an employment action of the defendant which violated Title VII. The plaintiff must have suffered an adverse employment action because of his complaint.

In this case, in rereading the testimony of the plaintiff, the court finds the plaintiff complained to President Potter that Dr. Roberts was not competent at her job and that the job opening was not advertised. The plaintiff asked Dr. Potter whether Dr. Roberts got the job because of her affair with the man who recommended her for the job. The question is: Is this complaint of the plaintiff protected action under Title VII? In ruling on this motion, the court must take all matters to which the plaintiff testified as true and in the light most favorable to the plaintiff.

The plaintiff testified in the first part of his testimony that he went to see Dr. Potter not to complain in regard to Dr. Roberts but to talk to him about the Audio-Visual Center and the problems that the center had encountered. As he said, this was his one chance to talk to President Potter whom he had previously not met. The plaintiff testified he was somewhat put out because Dr. Potter did not listen to him as closely as the plaintiff thought he should. The plaintiff said that Dr. Potter's eyes glazed over and that he stared out the window and at one time even talked on the phone to someone while the plaintiff was in his office hoping to talk to him. The plaintiff then became frustrated and, as he said, became angry and told Dr. Potter that Dr. Roberts was not competent and that he wondered if she got her job because of her alleged affair.

The court is making no judgment on this alleged affair and is making no judgment on whether the position should or should not have been advertised. The plaintiff argues that it should have been advertised. Dr. Potter and another administrator testified that it should not. The court does not have to make a judgment on this issue. The court finds that the matter is a question of fact, and the court is considering at this time that the position should have been advertised.

Assuming the foregoing, the court is of the opinion that the plaintiff did not engage in protected action in his conference with Dr. Potter. He did not go into the conference to complain about a gender discrimination problem and, in fact, did not complain about gender discrimination under Title VII. Preferential treatment of a paramour, while obviously unfair, is not gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women in the world

except the one paramour. *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (citing *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002).

The plaintiff's other complaint is that the position was not advertised. The defendants have cited a line of cases in which courts have declined to find that the failure to advertise a position amounted to gender discrimination. *See, e.g., Aldridge v. Tougaloo Coll.*, 847 F. Supp. 480, 484-85 (S.D. Miss. 1994); *Jackson v. City of Chicago*, No. 96 C 3636, 1996 WL 734701, at *1, n.3 (N.D. Ill. Dec. 18, 1996).

The court does not believe that Dr. Wilson ever really felt that he had been discriminated against because of gender. He testified that when Dr. Roberts got the job he was overjoyed and that he was happy to be out from under the "devil of the librarian." He was happy about Roberts' appointment until he had these disagreements with her and became angry and discouraged regarding her direction of the Audio-Visual Center.

The court also addresses the second reason that was raised, that is, whether a causal connection existed between the conference with Dr. Potter and the termination of the plaintiff. The testimony is uncontradicted that Dr. Roberts had agreed to merge the two departments and eliminate Dr. Wilson's job title before Dr. Wilson had the conference with Dr. Potter. Since Dr. Wilson did not engage in protected action, this matter is irrelevant; but even if the conversation had been protected action, the defendants have shown that the decision to merge the two departments had been made prior to the conference.

For the foregoing reasons, the court finds that the defendants' motion for judgment as a matter of law is well-taken and should be granted. It is, therefore,

ORDERED AND ADJUDGED that the defendants' motion for Judgment as a matter of law is **GRANTED.**

This, the 23 day of August, 2004.

/s/ Neal Biggers
NEAL B BIGGERS, JR.
SENIOR U.S.
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 17 2006
OFFICE OF THE CLERK

No. 05-610

In The Supreme Court of the United States

WILLIAM HARRY WILSON,

Petitioner,

vs.

DELTA STATE UNIVERSITY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

J. CAL MAYO, JR.
(Mississippi Bar No. 8492)
Counsel of Record

MARY ANN CONNELL
(Mississippi Bar No. 6460)
POPE S. MALLETTE
(Mississippi Bar No. 9836)
MAYO MALLETTE PLLC
428 North Lamar Boulevard
Post Office Box 1456
Oxford, Mississippi 38655
Telephone: (662) 236-0055
Facsimile: (662) 236-0035
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

INTRODUCTION AND QUESTIONS PRESENTED

During a meeting in April 2001, Petitioner William Harry Wilson, Director of Audio Visual Center at Delta State University, complained to President David Potter about a number of frustrations with his job. Sensing that President Potter was not concerned about his issues, Wilson, in a moment of anger, alleged that his immediate supervisor had received her position because of an affair she was having with a University vice-president. A few days later, the President's Cabinet approved a long-planned internal reorganization that eliminated Wilson's position and ultimately ended his employment with the University.

Wilson sued. The district court granted the University judgment as a matter of law after determining that Wilson did not engage in Title VII protected activity in his conference with President Potter and that Wilson failed to establish a causal connection between his conversation with President Potter and the decision to eliminate Wilson's position. The Court of Appeals for the Fifth Circuit affirmed on the questions presented to it, holding that the practice of which Wilson complained (that Roberts was hired because of an affair) is not a practice made unlawful by Title VII and, therefore, Wilson did not engage in statutorily protected conduct.

Wilson now distances himself from the issues argued below and presents the following questions to this Court:

> (1) Does section 704(a) of Title VII of the Civil Rights Act of 1964 protect an employee who mistakenly believed the practices he or she opposed

QUESTIONS PRESENTED – Continued

were unlawful if that mistake was based on an error of law?

(2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, after the individual objected to those practices, that the practices in question did not violate Title VII?

TABLE OF CONTENTS

	Page
INTRODUCTION AND QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
CLARIFICATION OF THE FACTS	2
A. Appointment of Dr. Roberts to CIPO Position and Her Relationship with Wilson	2
B. Development of Plan That Eliminated Wilson's Position	3
C. Wilson's Complaints to President Potter on April 20, 2001	4
REASONS FOR DENYING THE PETITION	5
I. The Questions Presented Were Not Presented to the Court Below	5
II. The Law Was Settled by 2001 That Paramour Favoritisim Does Not Violate Title VII	8
III. This Case Is Not an Appropriate Vehicle for Addressing the Questions Presented	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Ackel v. Nat'l Communications, Inc., 339 F.3d 376 (5th Cir. 2003) 9, 11, 12

Alack v. Beau Rivage Resorts, Inc., 286 F. Supp. 2d 771 (S.D. Miss. 2003) 14

Becerra v. Dalton, 94 F.3d 145 (4th Cir. 1996) 11

Boyd v. Runyon, No. 94-1557-JTM, 1996 WL 294330 (D. Kan. May 23, 1996) 12

Buenrostro v. Flight Safety Intern., Inc., No. CIV.A.SA-99-CA0819FB, 2001 WL 674171 (W.D. Tex. March 2, 2001), *aff'd in part*, 62 Fed. Appx. 556, 2003 WL 1202768 (5th Cir. (Tex.)) 12

Candelore v. Clark County Sanitation Dist., 752 F. Supp. 956 (D. Nev. 1990), *aff'd*, 975 F.2d 588 (9th Cir. 1992) 11

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Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 8

Ellert v. University of Texas, at Dallas, 52 F.3d 543 (5th Cir. 1995) 11

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TABLE OF AUTHORITIES – Continued

Page

Harvey v. Chevron U.S.A., Inc., 961 F. Supp. 1017 (S.D. Tex. 1997) 12

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 11

Lopez v. Four Seasons Nursing Ctrs., Inc., No. CIV.A.SA.99-CA07690G, 2000 WL 33348796 (W.D. Tex. December 13, 2000) 12

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) 6, 8, 13

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Proksel v. Gattis, 49 Cal. Rptr. 2d 322 (Cal. Ct. App. 1996) 12

Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366 (10th Cir. 1997) 10, 11

Thomson v. Olson, 866 F. Supp. 1267 (D.N.D. 1994), *aff'd*, 56 F.3d 69 (8th Cir. 1995) 11

Womack v. Runyon, 147 F.3d 1298 (11th Cir. 1998) 10

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

STATUTES

Title VII, Civil Rights Act of 1964 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

PUBLICATIONS

Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 Wash. & Lee L. Rev. 547 (1994) 9

Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, No. 915.048, 1990 WL 1104702 (January 12, 1990) 10

STATEMENT OF THE CASE

William Harry Wilson ("Wilson") sued his former employer Delta State University and related University officials claiming the University discriminated against him because of his gender by promoting Dr. Michelle Roberts ("Dr. Roberts"), a female, to the position of Chief Information and Planning Officer ("CIPO") instead of him. He also claimed the University later declined to renew his contract of employment in retaliation for his complaining on April 20, 2001, to then-President David Potter that Dr. Roberts was appointed to the CIPO position only because of a romantic relationship she was having with a high-level University administrator.

The district court granted the University summary judgment on Wilson's gender discrimination claim, finding the claim was time-barred. Trial commenced on August 2, 2004, on the retaliation claim. At the close of Wilson's case, the University moved for judgment as a matter of law, arguing that: (i) Wilson's complaint to then President Potter that Dr. Roberts received the CIPO position only because of an alleged relationship with a University vice-president was not statutorily protected activity under the retaliation provision of Title VII, and (ii) Wilson failed to establish a causal connection between his complaint to President Potter and the University's merging of two departments that resulted in the elimination of his position. The district court ruled from the bench in the University's favor and entered a Final Judgment and Order granting the University's motion on August 6, 2004. On August 24, the district court entered an Order and Opinion confirming his earlier ruling that Wilson had not engaged in protected activity in his conversation with President Potter and that there was not a causal connection between

the decision to eliminate Wilson's position and the April 20 conversation between Wilson and President Potter. Wilson appealed.

CLARIFICATION OF THE FACTS

Because the facts of this case make it an inappropriate vehicle for the Court to address the Questions Presented, the University presents the facts in more detail than does Petitioner and corrects certain statements in the Petition.

A. Appointment of Dr. Roberts to CIPO Position and Her Relationship with Wilson

Wilson was Director of the Audio-Visual Center at the University from 1983 to June 30, 2001. For many years, he reported to the Director of the Library. In October 2000, as part of an administrative reorganization, President Potter appointed Dr. Roberts to the CIPO position and moved Wilson under her supervisor.

The working relationship between Dr. Roberts and Wilson began cordially. Wilson said he was "thrilled to be out of the library"; happy to be out from under the "devil of the librarian"; felt he had been "liberated"; and would have "rehung the moon for her [Dr. Roberts]."

The relationship, however, deteriorated rapidly. On March 8, 2001, Dr. Roberts and Wilson had a particularly unpleasant meeting during which they discussed problems Wilson had with an audit of his equipment by the State Auditor and his threat to castrate another employee. Dr.

Roberts told Wilson that he had to come on board, cooperate with her, and assist her in developing a plan to move the University forward technologically. Wilson became visibly angry with Dr. Roberts, left the office, and slammed the door. At this point, Dr. Roberts decided that she could not work constructively with Wilson and would turn to Vicki Bond, Coordinator of Instructional Technology, and give her the opportunity that she had given Wilson, *i.e.*, to assist in moving the University forward on technology issues.

B. Development of Plan That Eliminated Wilson's Position

On March 9, 2001, Dr. Roberts met with Ms. Bond and asked her to prepare a plan to develop a stronger instructional technology program for the University. On March 27, Ms. Bond presented Dr. Roberts a plan for the merger of the Audio-Visual and Instructional Technology areas. Dr. Roberts used Ms. Bonds' suggestions in preparing her formal recommendation to the President's Cabinet for the merger of Audio-Visual (Wilson's department) and Instructional Technology (Ms. Bond's department), the elimination of Wilson's position, and the creation of a new unit – the Technology Learning Center (the "TLC").

During this same mid-March to mid-April 2001 time period, Dr. Roberts considered who she would want to lead the new TLC if the Cabinet accepted her recommendation that this new unit be created from a merger of Audio-Visual and Instructional Technology. After the March 8, 2001, meeting with Wilson, she knew she did not want him to be the director of the new Center. She observed Vicki Bond to be energetic, to be committed to moving the

University forward technologically, and to have an interest in leading the TLC. She decided to offer Ms. Bonds the leadership position if the Cabinet approved the merger.

Between April 4 and April 24, 2001, Dr. Roberts revised various drafts of her plan for the new Center. On April 24, 2001, Dr. Roberts presented her final reorganization plan to the Cabinet, which approved the combination of Audio-Visual and Instructional Technology that ultimately resulted in the elimination of Wilson's position.

C. Wilson's Complaints to President Potter on April 20, 2001

On April 20, 2001, Wilson went to President Potter's office to discuss the history of the Audio-Visual unit at the University and problems he was experiencing in his job. Wilson expressed his frustration at being left out of the new library building and being left out of discussions about the administrative reorganization in the Fall of 2000. He complained that the CIPO position was not advertised. He criticized Dr. Roberts' ability to do her job and to understand technology. Then Wilson became frustrated, got mad, and "said some things he should not have said", such as:

> Q: You said that Dr. Roberts, who was your supervisor at the time, was not qualified for the position and you had to conclude that she got the job because she was having a romantic relationship with her – at that time, her boss, Dr. Morganti?
>
> A: Yes.

The meeting ended shortly after this comment. Wilson provided no information that such a relationship actually

existed. He had testified that he had no proof of a relationship. As he put it, his information was all "just rumor and hearsay."

Following the Cabinet vote on April 24, President Potter notified Wilson that his position was being eliminated and that his contract with the University would not be renewed. Evidence at trial was uncontradicted that Dr. Roberts had decided to merge the two departments and eliminate Wilson's position before he had the April 20, 2001, conference with President Potter. Therefore, the district court found no causal connection between Wilson's complaints to President Potter and the elimination of his position.

REASONS FOR DENYING THE PETITION

I. The Questions Presented Were Not Presented to the Court Below.

In his Petition for Writ of Certiorari, Wilson presents his questions as follows:

> (1) Does section 704(a) protect an employee who reasonably but mistakenly believed the practices he or she opposed were unlawful if that mistake was based on an error of law?
>
> (2) Does an individual who opposed practices he or she believed were unlawful under Title VII lose the protections of section 704(a) retroactively if the court of appeals holds, *after* the individual objected to those practices, that the practices in question did not violate Title VII?